

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

GRID ONE SOLUTIONS, INC.,
Plaintiff,
v.
ELSTER AMCO WATER, LLC,
Defendant.

Case No. [15-cv-03452-JSW](#)

**ORDER GRANTING MOTION TO
DISMISS AND GRANTING, IN PART,
MOTION TO STRIKE AND
INSTRUCTIONS TO PARTIES**

Re: Docket Nos. 19, 20

Now before the Court for consideration are the motion to dismiss and the motion to strike, filed by Defendant Elster Amco Water, LLC (“Elster”). The Court has considered the parties’ papers, relevant legal authority, and the record in this case, and it has had the benefit of oral argument. The Court HEREBY GRANTS Elster’s motion to dismiss, GRANTS, IN PART, Elster’s motion to strike, and it GRANTS, Plaintiff Grid One Solutions, Inc. (“GOS”) leave to file an amended complaint.

BACKGROUND

On January 6, 2010, GOS and the City of San Francisco (the “City”), through the San Francisco Public Utilities Commission (“SFPUC”), entered into an “Agreement for Procurement, Installation and Implementation of an Advanced Meter Infrastructure System” (the “Prime Contract.”) (*Id.* ¶ 6, and Ex. A (Prime Contract).)¹

According to GOS, the City wanted to implement an Advanced Meter Infrastructure System (the “AMI Project”), and as part of the AMI Project wanted to: (1) acquire meter data from residential and commercial customers and to deliver meter data to the City to achieve reliable and

¹ At the time it entered into the Prime Contract, GOS was known as VSI Meter Services, Inc.

1 accurate reporting of water usage; (2) purchase a new AMI radio based automatic meter reading
2 system that was compatible with all meters that the City had installed; (c) remove and/or retrofit
3 existing water meters and install new meters, and/or registers, and meter interface units (“MTUs”);
4 and (d) create an effective interface between the City’s Customer Information System (“CIS”) and
5 the AMI system. The SFPUC wanted to “collect hourly consumption data from its retail water
6 customers to more efficiently manage its water resources and water system assets in San
7 Francisco, and to provide enhanced service to residential and commercial customers.” (Compl. ¶¶
8 7-9; *see also* Prime Contract at 9, Recitals, ¶ 1, Compl. Ex. B (Material Supply Agreement
9 (“MSA”), Recitals).)

10 On November 30, 2009, GOS and Elster entered into the MSA, whereby Elster agreed to
11 provide GOS with certain “AMI products, materials and services” that GOS needed to perform its
12 obligations under the Prime Contract. (*Id.* ¶¶ 3, 10.) The MSA also required that the products
13 would conform in all material respects to the technical specifications and performance standards
14 and that the services would materially comply with requirements set forth in the Prime Contract.
15 (Compl. ¶¶ 13-14; *see also* MSA, Article II.A.15.)

16 On March 1, 2011, the City issued a notice of Non-conforming Work and Direction to
17 Correct (“First Non-conforming Work Notice”), and it notified GOS that some of the AMI
18 Project’s system components “did not comply with the meter read accuracy/transmission accuracy
19 requirements set forth in the Prime Contract[.]” (*Id.* ¶ 15, and Ex. C (First Non-conforming Work
20 Notice).) GOS, in turn, notified Elster of the First Non-conforming Work Notice. (*Id.* ¶ 16, and
21 Ex. D.) Ultimately, after the City initiated a Proposed Change Order, GOS and Elster modified
22 the MSA to address the issues raised by the First Non-conforming Work Notice and the proposed
23 solutions to resolve the alleged non-conformities. (*See generally id.* ¶¶ 18-21, 26-27, and Ex. E
24 (“Modification No. 1”).) GOS alleges that it suffered a variety of damages because the Elster
25 Product did not conform with specifications set forth in the Prime Contract. (Compl. ¶ 28.)

26 According to GOS, Elster also was unable to supply GOS the contractually required
27 number of products between December 2010 and August 12, 2011, which resulted in two Project
28 shutdowns and “decreases in productivity averages.” (*Id.* ¶ 29.) Specifically, “Elster’s inability to

supply GOS the various meter sizes it required for installation caused GOS to skip routes, reduce its average meter install rate, prevented GOS from ramping up to full installation staff and resulted in layoffs and Project shutdowns.” (*Id.* ¶ 30.)

On August 6, 2013 and August 14, 2013, the City issued two notices of non-conformance (“Second Non-conforming Work Notice”), and GOS notified Elster of the notices of non-conformance.² (*Id.* ¶¶ 31-33, Exs. F-G.) The non-conformities caused the Project to shut down for approximately 70 weeks, but GOS was “contractually required to maintain its management and field presence, which directly resulted in extended general conditions and home office overhead being incurred by GOS.” (*Id.* ¶ 34.) GOS and Elster subsequently modified the MSA (“Modification No. 2”). (*Id.* ¶ 34, Ex. H (Modification No. 2).)

Based on these, and other allegations, which the Court shall address as necessary, GOS asserts one claim of breach of contract against Elster for: (1) failure to timely supply GOS the contractually required number products; (2) providing products that did not conform with meter read accuracy/transmission accuracy requirements; (3) providing products that did not conform in all material respects to the technical specifications and performance standards; (4) concealing the product’s inability to meet the AMI Project’s performance specifications; and (5) failing to indemnify GOS.

A. Applicable Legal Standards.

1. Motion to Dismiss for Failure to State a Claim.

A motion to dismiss is proper under Rule 12(b)(6) where the complaint fails to state a claim upon which relief can be granted. The Court’s “inquiry is limited to the allegations in the complaint, which are accepted as true and construed in the light most favorable to the plaintiff.” *Lazy Y Ranch LTD v. Behrens*, 546 F.3d 580, 588 (9th Cir. 2008). Even under the liberal pleadings standard of Federal Rule of Civil Procedure 8(a)(2), “a plaintiff’s obligation to provide the ‘grounds’ of his ‘entitle[ment] to relief’ requires more than labels and conclusions, and a formulaic recitation of the elements of a claim for relief will not do.” *Bell Atlantic Corp. v.*

² GOS has attached the notice dated August 6, 2013 to the Complaint.

1 *Twombly*, 550 U.S. 544, 555 (2007) (citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986)).

2 Pursuant to *Twombly*, a plaintiff must not merely allege conduct that is conceivable but
 3 must allege “enough facts to state a claim to relief that is plausible on its face.” *Id.* at 570. “A
 4 claim has facial plausibility when the Plaintiff pleads factual content that allows the court to draw
 5 the reasonable inference that the Defendant is liable for the misconduct alleged.” *Ashcroft v.*
 6 *Iqbal*, 556 U.S. 662, 678 (2009) (citing *Twombly*, 550 U.S. at 556). If the allegations are
 7 insufficient to state a claim, a court should grant leave to amend, unless amendment would be
 8 futile. *See, e.g. Reddy v. Litton Indus., Inc.*, 912 F.2d 291, 296 (9th Cir. 1990); *Cook, Perkiss &*
 9 *Liehe, Inc. v. N. Cal. Collection Serv., Inc.*, 911 F.2d 242, 246-47 (9th Cir. 1990).

10 **2. Motion to Strike.**

11 A court may strike from a pleading “any insufficient defense or any redundant, immaterial,
 12 impertinent, or scandalous matter.” Fed. R. Civ. P. 12(f). Immaterial matter “is that which has no
 13 essential or important relationship to the claim for relief or the defenses being pleaded.” *Fantasy*
 14 *Inc. v. Fogerty*, 984 F.2d 1524, 1527 (9th Cir. 1993), *rev’d on other grounds by Fogerty v.*
 15 *Fantasy, Inc.*, 510 U.S. 517 (1994) (internal citations and quotations omitted). Impertinent
 16 material “consists of statements that do not pertain, or are not necessary to the issues in question.”
 17 *Id.*

18 Motions to strike are regarded with disfavor because they are often used as delaying tactics
 19 and because of the limited importance of pleadings in federal practice. *Colaprico v. Sun*
 20 *Microsystems Inc.*, 758 F. Supp. 1335, 1339 (N.D. Cal. 1991). A motion to strike should be
 21 resorted to only when the matter to be stricken could have no possible bearing on the issues in
 22 litigation. *LeDuc v. Kentucky Central Life Ins. Co.*, 814 F. Supp. 820, 830 (N.D. Cal. 1992). The
 23 possibility that issues will be unnecessarily complicated or that superfluous pleadings will cause
 24 the trier of fact to draw unwarranted inferences at trial is the type of prejudice that is sufficient to
 25 support the granting of a motion to strike. *California Dept. of Toxic Substances Control v. Alco*
 26 *Pacific, Inc.*, 217 F. Supp. 2d 1028, 1033 (C.D. Cal. 2002). Ultimately, the decision as to whether
 27 to strike allegations is a matter within the Court’s discretion. *Colaprico*, 758 F. Supp at 1339.

B. The Court Grants the Motion to Dismiss, with Leave to Amend.

GOS has asserted one claim for breach of contract, the essential elements of which are: (1) the existence of a contract, (2) plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4) resulting damages to plaintiff. *Reichert v. General Insurance Co.*, 68 Cal. 2d 822, 830 (1969). Elster argues that GOS has not, and cannot, allege facts supporting the fourth element of the claim, because Article V.B.(2) of the MSA precludes GOS from recovering consequential and incidental damages.

In its opposition brief, and at the hearing, GOS argued that Article II.A.3 of the MSA permits it to recover the damages it seeks. It also argued that "Elster's failure to deliver conforming Products and Services is tantamount to a complete failure to meet the delivery schedule." (*See, e.g.*, Opp. Br. at 1:16-17.) GOS also argues that Article V.B(2) is not enforceable, either because Elster's actions caused Article II.A.3 to "fail[] for its essential purpose," or because Elster's alleged breach is "total and fundamental." (Opp. Br. at 2:17-22.)

The Court finds that the allegations are insufficient to show a breach of Article II.A.3, and that GOS would be entitled to the damages described therein for such a breach. GOS does allege that Elster failed to meet a product delivery schedule, and the MSA includes has an attachment identified as "Schedule 1 - Estimated Meter Delivery Time," but GOS has not included a copy of that schedule with the Complaint. In addition, Article II.A.3 states that Elster would have no liability under that provision "unless it's [*sic*] delivery is more than seven days past an agreed upon due date...." (MSA, Article II.A.3.) GOS has not included any facts about the timing of delivery, so the Court cannot determine if there are sufficient facts to support a breach.

In addition, although GOS alleges the AMI Project was shut down for an extended period of time, without additional facts, the Court cannot say it is a reasonable inference that the failure to provide non-conforming product is "tantamount to a complete failure to meet the delivery schedule," such that Article II.A.3 would fail for its essential purpose. Similarly, the facts alleged are insufficient to demonstrate that the failure to provide product was so fundamental that Article

V.B(2) should not be enforced.³ See, e.g., *Beltran v. Capitol Records, LLC*, No. 12-cv-1002-YGR, 2012 U.S. Dist. LEXIS 82025, at *6 (N.D. Cal. June 13, 2012).

Accordingly, the Court grants the motion to dismiss. However, because the Court concludes it would not be a futile act, it grants GOS leave to amend to cure the deficiencies identified above.

C. The Court Grants, in Part, the Motion to Strike.

Elster moves to strike paragraphs 22 through 25 of the Complaint, on the basis that they contain confidential settlement information, and it submits a declaration to support that assertion. (Declaration of James Allan, ¶¶ 4-8.) GOS contends that the statements addressed in the Complaint were made during the course of a commercial meeting, but it has not provided a declaration to support that statement.

Federal Rule of Evidence 408 prohibits the use of “conduct or a statement made during compromise negotiations about the claim,” when such conduct or a statement is used “to prove or disprove the validity or amount of a disputed claim[.]” Fed. R. Evid. 408(2).

Although, in general, the Court should accept the allegations in the Complaint as true, the Allan declaration stands unrebutted. Accordingly, the Court concludes that Elster has made a sufficient showing that the statements and information contained in paragraph 22, lines 15-24, and paragraph 23 are confidential settlement communications, and it shall strike them on that basis. GOS shall not include those allegations in the amended complaint permitted by this Order. The Court also notes that its ruling should not be construed as precluding GOS from seeking to admit these statements or other evidence on this issue as the litigation progresses.

Elster also argues that paragraphs 22 through 25 are immaterial, because they refer to alleged misrepresentations, and GOS’s sole claim for relief is for breach of contract. GOS argues that these paragraphs are relevant to the theory of relief discussed in the preceding section. Based on GOS’s theory of the case, and with the exception noted above, the Court cannot conclude that

³ At the hearing, GOS also argued that Elster had a shortage of product and so provided GOS with “something,” without knowing whether that product would comply with the Prime Contract’s specifications. Those facts also are not in the Complaint.

1 these allegations have absolutely no bearing on the claim for breach of contract.

2 Accordingly, the Court shall not strike paragraphs 22, 24 and 25 in their entirety, and it
3 denies, in part, the motion to strike on that basis.

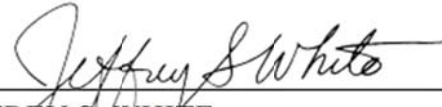
4 **CONCLUSION**

5 For the reasons set forth above, the Court GRANTS Elster's motion to dismiss, and it
6 GRANTS GOS leave to amend. The Court GRANTS, IN PART, Elster's motion to strike. GOS
7 shall file the amended complaint permitted by this Order by no later than January 8, 2016. Elster
8 shall answer or otherwise respond within the time set forth in the Federal Rules of Civil
9 Procedure.

10 It is FURTHER ORDERED that the parties shall file a stipulation and proposed order
11 selecting an ADR process and a deadline to complete ADR by December 16, 2015.

12 **IT IS SO ORDERED.**

13 Dated: December 9, 2016

14 
15 _____
16 JEFFREY S. WHITE
17 United States District Judge
18
19
20
21
22
23
24
25
26
27
28